No. 10727

In the United States Circuit Court of Appeals for the Ninth Circuit

JOHN R. HALEY, AS ADMINISTRATOR OF THE ESTATE OF GEORGE SALTER, DECEASED, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

UPON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF MONTANA

BRIEF FOR THE APPELLEE

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STATEMENT OF THE CASE

This statement is deemed necessary because of inaccuracies as to pertinent matters and omissions of other such matters in appellant's statement (Br. 2–8), especially the omission of the ruling of the trial court rejecting evidence of an order and allowances by a Montana Probate Court which were essential to appellant's cause of action. He failed to challenge this ruling in the specification of errors (Br. 8–9), treating the evidence as admitted (Br. 6, 10).

This suit was brought against the United States in February 1937 (R. 11), by the appellant, John R. Haley, as administrator c. t. a. of the estate of George

Salter, a soldier who died in October 1918, while insured in the sum of $10,000 under a contract of war risk term insurance (R. 16, 17, 23). The insured named himself as the beneficiary of the insurance (R. 23, 92). He died a resident of Montana, intestate (R. 13, 22) and without known heirs (R. 25, 28, 92) or assets (R. 14). The suit was brought to recover $4,004.59 of the insurance proceeds, in order that the estate (which contained no assets) might obtain funds sufficient to enable the appellant to comply with an alleged order of the Montana court which granted the letters of administration, directing him as administrator to pay out of "any" assets in the estate allowances allegedly made by that court against the estate upon two creditors' claims, and for administrators' and attorney's fees and misellaneous expenses of administration (R. 12, 13–15, 25–28, 35–39, 45–48). Appellant also sought another fee allowance for his attorney of 10 per cent of the amount of the insurance sought to be recovered (R. 21), $750.00 of which was to pay the fee allegedly allowed the attorney by the Montana court.

The amended complaint alleged, in effect, that the amount of any assets which might be acquired by the estate, sufficient to pay the alleged allowances, would not escheat to Montana under the laws of that State; that, accordingly, under the Federal statutes governing war risk insurance, proceeds of the insurance in the amount so allowed were exempt from escheat to the United States and were payable by it to the estate of the insured for distribution in accordance with

the allowances (R. 20–21). There were no allegations as to the merits of the allowances, or that either the United States or the State of Monana was a party to the proceedings in the State court.

The Government filed an answer (R. 22–24) denying, *inter alia,* the allegations in the amended complaint (R. 12, 15) as to the proceedings and allowances in the State court and the effects thereof on the question of escheat and the Government's liability. Appellant offered in evidence copies of portions of the records of the Montana court, where the insured's estate was being administered,[1] which contained merely the claims of the two alleged creditors (one by the administratrix of the estate of an alleged creditor who had died, and the other by the former administratrix of the insured's estate who had resigned and been succeeded by appellant), supporting affidavits by the claimants alone (there being no affidavit by the alleged creditor who died), endorsements on each claim signed by a judge of the State court reciting, in effect, merely that the claim was "allowed and approved" June 4, 1932, in a specified amount, an additional endorsement on the claim of the administratrix of the estate of the alleged creditor who had died, by the administratrix of the insured's estate, to the effect merely that the latter had previously "allowed and approved" the claim in full (R. 35–39), and an order dated March 16, 1940 (R. 45–48), by another judge, approving a report and

[1] Objection was waived to the substitution of copies for the original record.

settling and allowing an account, both of which had been filed by appellant, reallowing the amounts of the creditors' claims as previously allowed by the other judge, and allowing, in addition, interest on such amounts from June 4, 1932, the date of the prior allowances, allowing a fee to the prior administratrix and appellant, as administrator d. b. n., jointly, an attorney's fee, and miscellaneous expenses of administration. The order directed the appellant, as administrator, to pay these amounts out of "any" assets in the estate (R. 46). The order recited that it was entered after a hearing of which "due and legal" notice was given by posting the notice in public places and mailing a copy to the local United States Attorney. It was established at the trial that the hearing was continued from the date set in the notice; that the United States Attorney did not receive notice of the date on which the hearing was held, and that the proceedings were *ex parte* (R. 40, 41, 42).

It further appeared by the testimony of the appellant's attorney, who was the only witness at the trial in the court below, that the administratrix of the insured's estate applied for her letters of administration in 1930 (R. 25), more than eleven years after the insured's death, October 4, 1918 (R. 32). Her claim (R. 38) purported to be for nursing at $5.00 per day for 180 days between February 1 and October 1917 ($900.00), loans of money aggregating $300.00 between February 1, 1917, and April 25, 1918, the date of the insured's induction into the Army (R. 28), and interest at 8 percent, totalling $1,328 on both claims

from May 1, 1918, to March 1, 1932, the date of the claim.

The claim of the administratrix of the estate of the other alleged creditor purported to be for board, lodging, laundry, etc., at $75.00 per month over a period of ten months, from June 1, 1917, to May 1, 1918, six days after the insured entered the Army. It appeared, however, from one of the appellant's exhibits (R. 30) and the testimony of his attorney (R. 50) that the insured worked as a miner from some time during 1917 until he entered the Army, April 25, 1918, and that he had previously worked "for a while" during 1917 as a railroad fireman, i. e., that he was working during at least a substantial portion of the period during which, it was indicated by the creditors' claims, he was in need of care and unable to pay his board.

The record of the Montana court, offered in evidence by the appellant, concerning the allowances originally made on the claims (R. 35–39), does not indicate that the judge who made the allowances had before him any evidence in support of the claims except the affidavits of the two administratrices. The judge who made the reallowances in 1940 had no additional evidence before him except the testimony of appellant's attorney (R. 43). The allowance by the first judge of $748.00 on the claim (amounting to $1,495.83, for board and lodging, etc.) of the administratrix of the estate of the creditor who died involved the disallowance of a sum sufficient only to eliminate the interest claimed in the amount of $745.83, and an amount equal to less than one day's board and lodging, etc., at the rate charged by the claimant. Thus, the judge

left the insured's estate charged for board and lodging, etc., for more than five of the six days after the insured had entered the Army. The amount of appellant's claim disallowed was sufficient to eliminate $200.00 of the $1,200 claimed for nursing and money loaned and all of the amount claimed as interest (R. 38–39).

A fee of $500.00 alleged to have been allowed jointly to the appellant and his predecessor in office, the administratrix, was for "extraordinary" as well as ordinary services to the estate[2] (R. 47). Appellant's attorney, in answer to a question on cross-examination as to what "extraordinary" services were rendered, testified that "several times" during the four years of her administration, the administratrix in order to appear in court at Butte, Montana, where the estate was being administered, traveled with her husband and the witness in the latter's automobile over roads which "weren't very good" between her home at Helena and Butte, and spent the night in Butte, appearing in court the next morning (R. 48–49). The witness also pointed out, in this connection, that expenses for travel, stationery, stamps and telegrams, had not been charged against the estate, but "which could be a very considerable sum if it were added up" (R. 49–50).

The services rendered by appellant's attorney to the estate (for which a fee of $750.00 was allegedly al-

[2] There was no basis for an allowance for ordinary services, since the statute provided that commissions for such services should be based on "the amount of the estate accounted for" (Rev. C. Mont., 1935, sec. 10287), and there was no estate of the insured to be accounted for (R. 14).

lowed) apparently consisted almost entirely of efforts to collect the insurance from the Government[3] (R. 43, 49–50). The attorney testified, it is true, that "for a period of three or four years begnning with 1930" he had made a search for property belonging to the insured. It appears from the evidence, however, that the insured had been a man without a home,[4] kin (R. 28), or fixed occupation,[5] and that he moved from place to place prior to his induction into the Army.[6] The attorney, moreover, did not testify as to how much time and effort he had devoted to the search during the three or four years.

The Government objected to the introduction of records of the State court on the ground, *inter alia,* that they were incompetent, that the allowances contained therein were not conclusive in the instant case. (R. 33, 34, 40.) The court below admitted

[3] Congress has limited the amount of fees for such services to "$10.00 in any one case" except where insurance has been recovered by court action (when a fee not exceeding 10 percent of the amount recovered may be allowed by the court), and has imposed a penalty upon the receipt of a fee in excess of that amount (Section 500, World War Veterans' Act, 1924, as amended, 38 U. S. C. A. 551).

[4] According to his Army record (R. 32), he gave as his "Emergency address; Mrs. Ella Johnson—friend, care of Broadway Cafe, Butte, Mont." It was Mrs. Johnson's administratrix who filed the claim on behalf of her estate for board, lodging, laundry, etc.

[5] During the year he lived in Butte before entering the Army he had worked first as a railroad fireman and then as a miner (R. 30, 50–51).

[6] He was born in Canada (R. 30), and before moving to Butte had lived for "some months" in Great Falls, Montana (R. 51).

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the records subject to the objection (R. 34, 42), but later in an opinion (R. 78–87) rejected them as incompetent (R. 84).

The court admitted in evidence (R. 54), over appellant's objection (R. 55), the record of a former suit in the court below to recover all of the insurance covered by the policy, which had been brought by the administratrix of the insured's estate (appellant having been later substituted for her) and two other persons (R. 56–78). This record contained an order of District Judge Bourquin sustaining the demurrer to an amended complaint because it failed to allege that the persons joined as plaintiffs were in fact the heirs of the insured, having alleged merely that they had been so adjudged by a State court in a preceeding to which the United States was not a party. This adjudication, Judge Bourquin held, was not binding on the United States (R. 70). The complaint in that suit was later amended by adding the missing allegations as to heirship (R. 72). A demurrer was again sustained (R. 78), but apparently for insufficiency of the allegations as to the existence of a "disagreement" (R. 77) essential to the court's jurisdiction. The subsequent judgment of dismissal for failure to amend (inadvertently omitted from the printed record herein—see App. Br. p. 2), was concededly not on the merits. The court below made it clear in its opinion that it left undecided the question of whether it was bound by Judge Bourquin's holding in the instant case, and stated merely that it concurred therein, and regarded the rule announced

thereby as applicable to the allowances of creditors' claims and administration charges in the instant case (R. 83–84).

Both sides moved for judgment in the court below (R. 52–53). The court entered findings of fact, conclusions of law (R. 88–89) and judgment for the Government, dismissing the action on its merits (R. 90), and subsequently denied (R. 97–98) motions (R. 91–97) of appellant, in effect, for additional findings that the allowances were made in the State court and conclusively established that insurance in the amount of such allowances would not escheat under Montana law (R. 92–94), that the judgment for the Government should, accordingly, be set aside and a judgment entered for appellant, or, in the alternative, that a new trial should be granted (R. 95–97).

QUESTIONS PRESENTED

1. Where the existence and amount of any liability on the part of the Government to pay insurance proceeds to the estate of a deceased insured depends on whether and in what amount any assets in the insured's estate would escheat under the laws of the State of his residence, and where the existence and amount of such escheat depends upon the existence and amount of any debts or administration expenses properly chargeable against the estate, whether the probate court in which the estate is being administered lacks the power to bind the State and the Government on the matter of escheat by an order settling an account filed by the administrator and

directing payment of allowances on creditors' claims and for administration expenses from any assets in the estate, in view of the facts that there were no assets in the estate when the order was issued and that neither the State nor the Government were parties to the proceedings.

2. Whether, in any event, insufficient notice was given in the instant case of the proceedings in the probate court to bind either the Government or the State under State law.

3. Whether a Federal court, in order to decide the issue as to the Government's liability in a war risk insurance case involving the question of escheat, may determine whether there are any debts or administration expenses properly allowable against the insured's estate, without taking over or interfering with the administration of the estate by the probate court.

4. Whether, in any event, a probate court lacks the power to bind the Federal courts with respect to the liability of the Government, by an order allowing and directing the payment of an attorney's fee, receipt of which by the attorney would constitute a violation of a Federal penal statute.

5. Whether the court below properly admitted in evidence the record of the former suit in that court, and whether, in any event, no harm to the appellant resulted from that ruling.

SUMMARY OF THE ARGUMENT

The portions of the record of the probate court offered in evidence by the appellant were properly excluded and judgment was properly entered for the Government.

1. The alleged allowances and order as to debts and administration expenses by the probate court (contained in the portions of the record), upon which appellant solely relies, could not prejudice the rights of the United States or the State of Montana in the matter of escheat.

(a) The effects thereof, if any, upon the rights of the Government or the State are governed by a provision of the Uniform Declaratory Judgments Act of Montana, that all persons with an interest which would be affected by a declaratory judgment should be made parties to the proceedings, and that no declaration should prejudice the rights of any stranger thereto.

(1) The alleged allowances and order were declaratory since there were no assets in the estate upon which they could operate, and they would not be effective unless and until the estate should acquire sufficient assets.

(2) Both the Government and the State had interests which would be affected by the declaration, since, if both were bound thereby, appellant would be entitled to recover from the Government in the instant case and the State would be precluded from claiming that the amount so recovered would escheat.

(b) Since the Government and the State were not parties to the proceedings, the rights of neither could be prejudiced thereby.

(c) In any event, it does not appear that the State or the Government received notice of the proceedings sufficient to bind either of them under State law.

2. Rejection by the court below of the allowances and order of the probate court would not involve interference with or taking over the probate of the estate by a Federal court.

3. The United States should not be bound by the allowance of the attorney's fee made by the probate court, in any event, since the result would be to compel the United States to furnish the funds for the payment of a fee prohibited by one of its penal statutes.

4. The court below did not commit reversible error in admitting in evidence the record of the former suit in that court.

ARGUMENT

The portions of the record of the probate court offered in evidence by the appellant were properly excluded and judgment was properly entered for the Government

The findings of fact of the court below (R. 88–89) (which appellant does not dispute (Br. 9)), that the insured died a resident of Montana, intestate and without known heirs, fully support its conclusion of law (R. 89) that none of the insurance was payable to the estate of the insured in view of the provisions of 38 U. S. C. A. 514, that "when the estate of an insured would escheat under the laws of the place of his residence the insurance shall not be paid to the estate but shall escheat to the United States * * *."[7] Appellant places his sole reliance upon the alleged existence of debts of the insured and administrative expenses which, if properly allow-

[7] Portions of the argument in the appellant's brief (Br. 10–11, 14) are wholly in accord with this view but contrary in effect as to the first statement in his argument (Br. 10).

able against his estate, would have priority, in the amount thereof, over a claim of escheat on behalf of the State of Montana to any assets the estate might acquire.

In the amended complaint appellant properly assumed the burden of proving the existence of such debts and expenses (R. 13–15, 20–21), but, in order to meet that burden at the trial, relied exclusively upon the portions of the record of the State Court offered in evidence by him relating to the allowances and the order settling an account, filed by him as administrator, and directing him as such to pay such allowances from "any" assets in the estate (R. 46). His position is, in effect, that the allowances and order, regardless of lack of merit, are conclusive on the State of Montana and thus establish exemption from escheat to that State, in the amount of such allowances, of any assets the estate might acquire; and that they are also conclusive on the Government as to such exemption. It is submitted that the court below properly rejected this evidence, and that, therefore, appellant failed to make out a case for recovery.

1. The alleged allowances and order could not prejudice the rights of the United States or the State of Montana.

(a) The effects (if any) of the alleged allowances and order upon the rights of the Government or the State are, we submit, governed by a provision of the Uniform Declaratory Judgments Act of Montana (Rev. C. Mont. 1935, c. 90, Sec. 9835.11):

> When declaratory relief is sought, all persons shall be made parties who have or claim any

interest which would be affected by the declaration, and no declaration shall prejudice the rights of persons not parties to the proceeding.

(1) Unlike the usual allowances and orders settling accounts of administrators, the allowances and order on which appellant sought to rely were merely declaratory, since there were no assets in the estate upon which they could operate. "The distinctive characteristic of the declaratory judgment is that the declaration stands by itself; that is to say, no executory process follows as of course." *Kariher's Petition No. 1,* 284 Penn. 455, 463, 131 A. 265, 268. See also *Sheldon* v. *Powell,* 99 Fla. 782, 793, 128 So. 258, 263; *Ferris* v. *Phoenix Life Insurance Company,* 272 N. Y. Supp. 782, 784. The law of Montana requires that upon settlement of the account of an administrator the court must make an order for the payment of the debts "as circumstances of the estate require" (Rev. C. Mont. 1935, S. 10311), and that when such an order is made "the administrator is personally liable to each creditor for his allowed claim and execution may be issued on such order as upon a judgment in court, in favor of each creditor, * * * The administrator is liable therefor on his bond to each creditor" (*Ibid.* S. 10313). Manifestly no such liability arose upon the issuance of the order in the instant case. The source of payment was specifically limited by the order itself to "any assets in the estate", and as there were no assets in the estate at the time the order was issued, it could plainly not be effective unless and until the estate should acquire sufficient assets to comply with the order. Its

declaratory nature is, therefore, obvious. That the Declaratory Judgments Act embraced such an order, moreover, is shown by the following provisions of another section thereof (*Ibid.* S. 9835.4):

> Any person interested as * * * administrator or * * * creditor in the administration of * * * the estate of the decedent * * * may have a declaration of rights or legal relations in respect thereto;
>
> * * * * *
>
> (b) To direct * * * administrators * * * to do or abstain from doing any particular act in their fiduciary capacity; or
>
> (c) To determine any questions arising in the administration of the estate * * *.

(2) It is obvious that both the Government and the State of Montana had interests which would be affected by the declaration since, if both were bound thereby, appellant would be entitled to recover from the Government in this suit insurance in the amount of $4,004.59, and the State would be precluded from claiming that the amount so recovered would escheat to it. (It should be noted in this connection that the State would not be bound by the decision of this Court in the instant case, since it is not a party thereto and the proceeding is not *in rem.*)

(b) Since neither the Government nor the State were parties to the proceedings, the rights of neither could be prejudiced by the allowances or orders, and the latter were therefore properly excluded from the evidence. In *Hastings* v. *United States,* 133 F. (2d) 218, 220 (C. C. A. 6th), which, as here, involved the

question of escheat of war risk insurance to the Government, it was held under a provision in the Declaratory Judgments Act of Tennessee, identical with the provision in the Montana statute, that the District Court correctly excluded a declaratory judgment to the effect that the estate of the insured would not escheat under Tennessee law, rendered by a Tennessee court in a proceeding to which the Government was not a party. That holding is, we submit, obviously applicable here.

(c) In any event, it does not appear that the State or the Government received notice of the proceedings in the probate court sufficient to bind either of them under the law of Montana. In order to make the order settling the account binding upon everyone, it was essential that the Clerk of the Court give notice of the hearing by posting notices in at least three public places in the County (Rev. C. Mont. 1935, S. 10299; *In re Davis' Estate,* 35 Mont. 273, 280, 88 Pac. 957, 958). Notices were posted in the instant case, and the United States Attorney received a notice by mail, but it was conceded, in effect, by appellant's attorney in the court below (R. 40–41) that he had the hearing continued until a later date and did not know whether further notice was given, by posting or otherwise, as to the new date for the hearing. Counsel for the Government denied that the Government received notice thereof (R. 40), and this denial is not disputed by appellant. The recital in the order settling the account that "due and legal" notice was given by the Clerk, by posting and mailing a copy to the United States Attorney, would not be conclusive

if contradicted by the record of the proceedings. *State ex rel. Regis* v. *District Court,* 102 Mont. 74, 55 Pac. (2d) 1295. Whether the record shows that no notice was given as to the date on which the hearing was held does not appear because appellant elected to offer only portions of the record in evidence. The presumption, therefore, arises that the recital in the order is refuted by portions of the record which he failed to introduce. If it were to be assumed, moreover, that notice was given, there is no indication that the contents thereof was sufficient to advise the State of Montana of its interest in the proceedings, i. e., that the purpose thereof was to enable the estate, which was otherwise without assets, to obtain insurance proceeds against which the State might claim an escheat. Unless the State were thus sufficiently advised of its interest, it could not, we submit, be bound by the order in question. Cf. *State ex rel. Regis* v. *District Court, supra.*

2. Contrary to appellant's suggestion (Br. 18), the rejection by the court below of the allowances and order of the State probate court did not, we submit, involve interference with or taking over the probate of the estate by a Federal court. Nor would there have been such interference or taking over if it had been necessary for the court below to make a determination as to the existence and amounts, if any, of debts and administration expenses, properly chargeable against the estate. Such a determination would not be effective to impair or set aside the allowances and order of the probate court in so far as it might differ from them. It would be effective

solely upon the decision in the instant case of the question as to the Government's liability under a Federal statute. Cf. *Smith* v. *United States,* 83 F. (2d) 631, 638 (C. C. A. 8th). If the State of Montana, a stranger both to the proceedings in the probate court and to the instant case, should challenge in the probate court the allowances and order in question for the purpose of claiming an escheat of insurance proceeds which would be received by the estate in the event of a recovery in the instant case, or of claiming escheat of any other assets the estate might later acquire, the probate court would obviously be free to set aside the allowances and order despite a determination by this Court that it and the court below were bound thereby in determining the question as to the Government's liability to the estate. And, similarly, a determination by this Court or the court below that there were no debts or administration expenses allowable against the estate and, hence, that no insurance was payable to it, would not preclude the probate court from adhering to its prior allowances and order in the event of a challenge thereof by the State for the purpose of claiming escheat of any assets, other than insurance, which the estate might acquire.

3. The United States should not be bound in this case by the allowance of the attorney's fee made by the probate court, in any event, since the result would be to compel the United States to furnish the funds for the payment of a fee, receipt of which by the attorney would, we submit, constitute a violation of one of its penal statutes. Cf. *Smith* v. *United States,*

supra. As previously shown,[8] the services for which the fee was allowed, in the amount of $750.00, were rendered almost entirely in connection with the claim for insurance. Section 500, World War Veterans' Act (38 U. S. C. A. 551), limits a fee for such services to $10.00, and imposes a substantial penalty upon the obtaining of a fee in excess of that amount. *Hines* v. *Lowrey,* 305 U. S. 85.[9] If appellant's attorney should receive the fee in question, this statute would we submit, plainly be violated. Manifestly the United States should not be compelled to furnish the money for that purpose.

4. *Brown* v. *United States,* 65 F. (2d) 65 (C. C. A. 9th), upon which appellant so heavily relies (Br. 11–13), is manifestly distinguishable from the instant case, since the questions here presented were not before this Court in that case.

5. The court below did not commit reversible error in admitting in evidence (R. 54) the record of the former suit in that court to recover the full amount of the insurance under the policy here in suit (R. 56–78), which, as previously indicated in the Statement of the Case, was introduced merely to bring before the court an opinion rendered by Judge Bourquin on sustaining a demurrer to the complaint. It was not necessary to introduce this record, since the court below could have taken judicial notice thereof. *United States* v. *Pink,* 315 U. S. 203, 216. No prejudice, moreover, resulted to appellant, since the

[8] Statement of the Case, *supra*, p. 1.

[9] The full text of the section is contained in Note 1 to the Supreme Court's opinion.

court below left undecided the question whether it was bound by Judge Bourquin's holding, stating merely that it concurred therein and regarded the rule announced thereby as applicable to the instant case (R. 83–84). Indeed, appellant does not contend that there was any prejudice, since he does not pray for a new trial in the event that his prayer for judgment should be denied (Br. 20).

CONCLUSION

For the reasons stated, it is respectfully submitted that the judgment below should be affirmed. In this connection, appellant, while praying this Court for a judgment in his favor, does not ask in the alternative for a new trial (Br. 20). Unless, therefore, this Court should determine that he is entitled to judgment on the record as it stands, the judgment for the Government should, we submit, be affirmed.

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